

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAY 13 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2009-0314
)	DEPARTMENT A
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
LOUIS RAY MARTINEZ,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR-20060350

Honorable Robert Duber II, Judge

VACATED AND REMANDED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra

Tucson
Attorneys for Appellee

Emily Danies

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Attorney for Appellant

HOWARD, Chief Judge.

¶1 After a jury trial held in his absence, appellant Louis Martinez was convicted of one count each of second-degree escape, possession of drug paraphernalia, and failure to register as a sex offender. The trial court suspended imposition of sentence

and placed Martinez on probation for twenty-four months for the first two counts and ordered him incarcerated for six months for failure to register. Martinez argues on appeal, and the state concedes, that the trial court denied Martinez his right to counsel and a fair trial by failing to follow appropriate procedures to determine if he was indigent and thereby failing to appoint counsel to represent him at trial. We vacate Martinez's conviction and remand for a new trial for the reasons stated below.

Factual and Procedural Background

¶2 The relevant facts are undisputed. Martinez was charged with several misdemeanors and felonies but signed an agreement with the state to defer prosecution on the charges.¹ When he violated the terms of the deferred prosecution agreement, the state filed a petition to reinstate his prosecution. Martinez asked the court to appoint an attorney to represent him, but the court denied his request and instead “directed [Martinez] to speak with []his father to determine if his father will help him obtain private counsel.” The court did not ask Martinez to provide any information on his indigence.

¶3 The minute entry from a subsequent hearing on the case reflects that Martinez informed the court that his father was “expecting to receive a large check” and, “upon receipt of that check,” would “be able to help him secure an attorney.” No defense attorney ever filed a notice of appearance on Martinez's behalf, however, and the parties agree that Martinez's father never was able to hire an attorney.

¹Under the terms of the “Deferred Prosecution Contract,” the Gila County attorney agreed to suspend prosecution in Martinez's case. If Martinez abided by the terms of the agreement for two years, the county attorney would then dismiss all pending charges.

¶4 The state eventually offered Martinez a plea agreement, which he signed without the assistance of counsel. Because Martinez failed to appear for the subsequent change-of-plea hearing, however, and no attorney appeared on his behalf, the state withdrew the plea offer, and a trial date was set. Martinez also failed to appear for trial, and no attorney was present to represent him. Martinez was convicted on all counts and now appeals from these convictions.

Discussion

¶5 Martinez asserts the trial court violated his right to counsel by failing to appoint an attorney to represent him and instead directing him to ask his father to help him retain an attorney. Martinez did not raise this issue below. Nevertheless, deprivation of counsel is structural error, which cannot be waived. *See State v. Aragon*, 221 Ariz. 88, ¶ 9, 210 P.3d 1259, 1262 (App. 2009).

¶6 A criminal defendant is guaranteed the right to counsel. U.S. Const. amend. VI; U.S. Const. amend. XIV; Ariz. Const. art. II, § 24. And an indigent defendant is “entitled to have an attorney appointed to represent him.” Ariz. R. Crim. P. 6.1(b). Here, Martinez informed the trial court that he was indigent and requested an appointed attorney. But the court denied his request without inquiring into Martinez’s indigence, directing him instead to see if his father could provide him with financial assistance to hire a private lawyer. Although Martinez subsequently indicated that his father might be able to help him pay for a private attorney, none appeared for him. And such an indication does not constitute a voluntary waiver of his right to counsel. *See* Ariz. R. Crim. P. 6.1(c) (defendant may waive right to counsel *in writing*). In any event,

the trial court should not consider an adult defendant's parents' resources when determining whether the defendant is indigent and therefore entitled to appointed counsel. *See Knapp v. Hardy*, 111 Ariz. 107, 110, 523 P.2d 1308, 1311 (1974); *State v. Vallejos*, 87 Ariz. 119, 123, 348 P.2d 554, 557 (1960). Because the court never inquired into Martinez's indigence, *see* Ariz. R. Crim. P. 6.4(b), and never appointed an attorney to represent him during trial, Martinez was denied his right to counsel.

Disposition

¶7 For the reasons explained above, we vacate Martinez's convictions and sentences and remand his case for a new trial.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge